

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-2044

Wayne Allen Berry,	*	
	*	
Appellant,	*	Appeal from the United States
	*	District Court for the Southern
v.	*	District of Iowa.
	*	
Leonard Graves,	*	[UNPUBLISHED]
	*	
Appellee.	*	

Submitted: January 15, 2003

Filed: January 22, 2003

Before LOKEN, FAGG, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Wayne Allen Berry appeals the district court's* denial of Berry's 28 U.S.C. § 2254 petition for habeas relief. Berry claims his trial counsel was ineffective for failing to object to the prosecutor's alleged references to Berry's post-arrest silence during closing argument. Having carefully reviewed the record, we believe the district court correctly agreed with the state court's decision that the prosecutor's comments did not violate Berry's right to silence. Three of the prosecutor's

*The Honorable Ronald E. Longstaff, United States District Judge for the Southern District of Iowa.

statements were permissible references to Berry's pre-arrest silence. Vick v. Lockhart, 952 F.2d 999, 1003 (8th Cir. 1991). The prosecutor's fourth statement, that Berry had "eighty-eight days . . . in jail . . . to concoct his story and make it look good when he gets up and testifies," was not an impermissible reference to Berry's post-arrest silence. Catches v. United States, 582 F.2d 453,458 (8th Cir. 1978). Because the state court reasonably concluded that defense counsel's failure to object to the prosecutor's comments was not ineffective assistance, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.